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No. 91-1554

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARCHDIOCESE OF PORTLAND IN OREGON and DIOCESE OF BAKER,

Petitioners,

v.

EMPLOYMENT DIVISION, STATE OF OREGON, Pamela A. Mattson, Administrator,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS TO DENY THE WRIT

A. Background.

Petitioners, the Archdiocese of Portland (Oregon) and the Diocese of Baker (Oregon), are non-profit, religious corporations which serve as local governing bodies of the Roman Catholic Church. They employ large numbers of individuals, many in connection with private, church-affiliated schools. The Oregon Employment Division (Division) seeks to require petitioners to participate as employers in Oregon's unemployment compensation system. If the Division prevails, petitioners will have to pay unemployment compensation taxes or repay to the state the amount of any benefits awarded to their employees. Petitioners' employees, in turn, will be entitled to unemployment benefits if they quit their employment for "good cause" or if they are discharged for reasons other than work-related "misconduct."[1]

The controversy in this case arises as a direct result of two state court decisions interpreting the religion clauses of the Oregon Constitution. *Salem College & Academy v. Employment Division*, 298 Or. 471, 695 P.2d 25 (1985); *Employment Division v. Rogue Valley Youth For Christ*, 307 Or. 490, 770 P.2d 588 (1989). Prior to those decisions, the Oregon statutes exempted churches and church-affiliated religious organizations from participation in the state's unemployment compensation system. Religious entities without any connection to an organization that qualifies as a "church" ("unaffiliated" religious organizations) were not exempt. The Oregon Supreme Court concluded that neither churches nor church-affiliated organizations may be preferred (via tax exempt status) over unaffiliated religious

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[1] *See generally* Or. Rev. Stat. § 657.176(2), set forth at Pet. Cert. App.-51.

organizations without violating the state constitutional requirement of sectarian neutrality.[2] In effect, as a state law matter, Oregon is obligated to treat churches, church-affiliated organizations and unaffiliated religious entities the same. Rather than exempt unaffiliated organizations and risk having Oregon fall out of compliance with the federal act (FUTA)[3], the state court construed Oregon's statute to require all religious organizations to participate in the scheme. *Salem College & Academy v. Employment Division*, 298 Or. at 492–98; *Employment Division v. Rogue Valley Youth For Christ*, 307 Or. at 496–97.

After those decisions, the Division notified previously exempt churches and church-affiliated employers, including petitioners, that they are "subject employers" who must participate in Oregon's unemployment compensation system. Petitioners challenged the Division's action on the ground, *inter alia*, that their participation would violate the Establishment Clause of the First Amendment. The Oregon Court of Appeals rejected petitioners' challenge in a *per curiam* decision, citing *Salem College & Academy v. Employment Division* and *Employment Division v. Rogue Valley Youth For Christ*. (Pet. Cert. App.-1). The Oregon Supreme Court declined discretionary review. (Pet. Cert. App.-48).

The question presented in the certiorari petition is whether Oregon violates the Establishment Clause of the First Amend-

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[2] Or. Const. Art. I, §§ 2,3.

[3] The Federal Unemployment Tax Act (FUTA) permits but does not require states to exempt churches and church-affiliated organizations that would otherwise qualify as employers who must participate in the compensation program. The federal act does not permit states to exempt religious organizations that are not affiliated with "churches." *See generally Salem College & Academy v. Employment Division*, 298 Or. at 476–77 (discussing mandatory and permissive aspects of the federal act).

ment by requiring a church to be a "subject employer" under the Employment Division Law. (Pet. Cert. at 1). The actual issue framed by petitioners' argument, however, is considerably more narrow. Petitioners assert that subjecting them to the Employment Division Law will impermissibly "entangle" government in the church's internal affairs when the state investigates and adjudicates claims arising out of doctrinally based separations from employment. Petitioners urge, for example, that government will intrude into areas involving religious tenets and beliefs in determining whether an employee fired for violating church doctrine engaged in misconduct connected with work. Relying exclusively on dictum in this Court's opinion in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), petitioners appear to claim that the mere possibility of such an adjudication violates the Establishment Clause. Pet. Cert. at 15–16.

B. The Issue Presented is Premature.

The issue petitioners seek to have the Court review is one the state courts have never resolved, either for or against petitioners' position. Instead, the Oregon Supreme Court has invited employers to present the claim if and when an actual case involving a doctrinal dispute arises. Specifically, in *Salem College & Academy v. Employment Division*, unaffiliated religious schools made the precise Establishment Clause argument that petitioners assert here, and they relied on the same dictum from *NLRB v. Catholic Bishop* that petitioners now cite. Justice Linde, writing for the Oregon Supreme Court, responded:

> [T]he Academy [claims it] cannot maintain the doctrinal standards required of its employees and discharge an employee for failing to meet those standards without opening its doctrines and faith to Employment Division scrutiny in protracted and expensive contests over benefits, administrative determinations that will "entan-

> gle" the state in religion. This eventuality can adequately be dealt with when and if it happens; we have no reason to believe that discharges of school employees over matters of religious doctrine are so frequent as to require the employer's entire exemption from the unemployment compensation system on that account.

Salem College & Academy v. Employment Division, 298 Or. at 487.

The remote and uncertain character of petitioners' entanglement concern is underscored by the record petitioners made below. Petitioners presented evidence at their administrative hearing that they in fact have discharged employees for doctrinal reasons in the past. They did not, however, present evidence that those discharges led to the entanglement they predict. The most they established was that while several hundred people have left their employment over the last three years, only five have been fired for doctrinally based reasons. Of those, two may have sought unemployment compensation benefits. Decision of the Referee (Pet. Cert. at App.-18). Petitioners did not establish that those individuals obtained benefits at all, and they presented nothing to suggest that the administrative hearings on those claims (assuming there were any) presented the state with a doctrinal dispute of any kind. On the basis of that showing, the hearing referee concluded that petitioners "have not established that a reai problem has occurred in this area. Such problems may occur in the future in either a benefit or tax case. As the [Oregon Supreme Court] stated, these problems could then be addressed." *Ibid.*

Oregon's experience over the last several years and the experience of other states suggest that the doctrinal inquiries petitioners fear to be inevitable, if they arise at all, will be rare. More than six years have passed since the Oregon Supreme Court

first extended its invitation to religious schools to raise the entanglement claim in the context of a concrete dispute. To date, there has not been a single assertion by an employer or employee that adjudication of an unemployment benefits claim has in fact caused the state to inquire into or pass judgment upon the doctrines of any church or other religious organization.

Nor has the extension of the unemployment compensation program to non-exempt religious organizations elsewhere in the country given rise to entanglement problems. Under the federal act, all states have been required to cover employees of unaffiliated religious schools since 1976.[4] Petitioners have cited no case, and the Division is aware of none, in which a benefits dispute has presented a doctrinal inquiry of the kind petitioners fear. Moreover, according to petitioners, two states in addition to Oregon also extend unemployment coverage to employees of churches and church-affiliated organizations. Pet. Cert. at 19. Yet, petitioners can point to no case or adjudication from either of those states in which a doctrinal intrusion has become a reality.

In short, the Oregon courts have yet to resolve the issue the certiorari petition presents because the perceived constitutional problem is at this point wholly speculative. Any resolution would be advisory and would force a sensitive First Amendment question to be decided in a vacuum. The Court's own decisions consistently decline to resolve issues that are not ripe for resolution, recognizing that the ripeness doctrine serves "to

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[4] FUTA was amended in 1976 to require coverage of employees of religious schools unaffiliated with a church or convention or association of churches. *See* § 115(b)(1) of the Unemployment Compensation Amendments of 1976, Pub. L. 94-566, 90 Stat. 2670; discussed and interpreted in *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981).

prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative polices, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *accord Laird v. Tatum*, 408 U.S. 1, 11-15 (1972) (dismissing complaint that military data system chilled First Amendment rights based on speculative apprehension that Army might misuse information in the future). Petitioners have made no effort to explain to the Court why their entanglement claim is not better resolved when and if doctrinally grounded disputes in fact arise. The issue the petition presents is premature and the Court should decline petitioners' invitation to decide it in the abstract and advisory setting of this case.

C. Lower Court Decisions Will Refine and Narrow the Issues in Ways that Will Aid Review.

The fact that no court in the country appears to have been presented with an entanglement claim in the context of an actual unemployment compensation benefits dispute suggests another reason why the Court should deny the petition. The question presented comes to the Court without the aid of a cross-section of judicial opinions crafted in a variety of factual settings that would serve to highlight the particular considerations that should bear on the constitutional analysis. Such an abstract presentation of a constitutional question does little to refine and narrow the issues or to assist the Court by focusing on the areas in which lower courts are in need of practical guidance.

The issue, as framed by petitioners, demonstrates the problem. Petitioners assume throughout their argument that an Establishment Clause analysis properly can be invoked in this

context. They make no effort to assess whether the values the Establishment Clause was designed to protect are even implicated where, as here, a state seeks to treat all religious organizations neutrally and on the same terms as non-sectarian organizations.

It is a somewhat odd proposition to assert, as petitioners necessarily must, that a state "establishes" religion by subjecting all religious entities, along with all other employers, to an administrative system requiring them to provide unemployment benefits to their employees. Requiring religious employers to participate in a generally applicable employee benefits program does not lend government's imprimatur to any particular religion or to religion in general, or otherwise lead to "sponsorship, financial support, and active involvement of the sovereign in religious activity." *See Walz v. Tax Commission*, 397 U.S. 664 (1970)(listing these as the main evils that the Establishment Clause guards against).[5] No money will flow from the state to religious organizations, thereby supporting their activities.[6] No "divisive political potential" is apparent, and petitioners suggest

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[5] Similarly, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court set out a three-part test for determining whether entanglement was excessive:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the *institutions that are benefitted*, the *nature of the aid that the State provides*, and the resulting relationship between the government and the religious authority.

402 U.S. at 757 (emphasis added). As in *Walz*, the Court discussed entanglement only in the context of governmental actions that benefitted, aided or otherwise fostered religion. Consider also, *Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) (suggesting that entanglement analysis is more appropriately viewed as an aspect of the *Walz* "effects" test); Choper, THE RELIGION CLAUSES OF THE FIRST AMENDMENT: RECONCILING THE CONFLICT, 41 U. Pitt. L. Rev. 673, 680–85 (1980) (criticizing "entanglement" analysis).

[6] *E.g.*, *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

none.[7] Nor will government powers vest in religious bodies.[8] Finally, nothing before the Court suggests that application of the Employment Division Law to petitioners will lead to the type of pervasive monitoring of church activities the Court has generally rejected; at most, the participation of religious entities might give rise to rare instances of adjudicatory action, not the day-to-day entangling relationships between state regulators and religious entities that the Court in other contexts has condemned.[9]

Lower courts should be permitted to sort out these and other possible predicate inquiries in the first instance, and they should be permitted to do so in the context of tangible factual controversies. The benefit would be two-fold. First, the Court's own resolution of the issues would be enhanced by having lower courts bring to the question their own broad experience in adjudicating a large number of cases in a variety of factual settings. Second, the issues would be narrowed, sharpened and refined in a way that would permit this Court more effectively to confine its review to those questions that in fact merit resolution at a national level (*e.g.*, issues that give rise to conflicts among lower courts and questions on which settled precedent provides confusing guidance).

D. There is No Demonstrated Need for the Court's Guidance on this Question.

In the absence of a body of lower court case law and a conflict among those lower courts,[10] it is impossible to assess

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[7] *See Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

[8] *E.g.*, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

[9] *See, e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 414 (1985).

[10] Petitioners attempt to suggest a conflict by asserting: "Varying state court decisions regarding the constitutionality of exclusions allowed under § (continued...)

whether and to what extent lower courts will even need the Court's guidance on the issue petitioners present. When ripe controversies are presented, lower courts may discover answers to petitioners' challenge that do not require resort to First Amendment principles at all. For example, if and when the Oregon state courts reach the "entanglement" problem in the context of a tangible dispute, they may resolve the issue on non-federal grounds. As this Court has observed, it is the Oregon courts' usual practice to consider state law issues before federal ones. *Employment Division v. Smith*, 485 U.S. 660, 665 and n. 9 (1988) *quoting Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981)("The state does not deny any right claimed under the federal constitution when the claim before the court in fact is fully met by state law"). The Oregon courts frequently analyze and decide questions under the state constitution in a way that

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[10](...continued)

3309(b) of FUTA are increasingly frustrating the uniformality [*sic*] of state coverage which FUTA was designed to promote and should be resolved by this Court." Pet. Cert. at 16–17. The federal statute, 26 U.S.C. § 3309(b)(1), expressly permits states to choose whether to extend unemployment coverage to church employees or to exempt them from state unemployment schemes. Thus, in the specific context presented by this case, there is no intended uniformity to frustrate.

Moreover, the only state court case cited by petitioners is *Christian Schools Ass'n v. Commonwealth Dept. of Labor*, 55 Pa. Commw. 555, 423 A.2d 1340 (1980). There the Pennsylvania state court struck down the distinction between affiliated and unaffiliated religious schools, holding that they must be treated the same under Free Exercise and Equal Protection principles. The analysis was consistent with the Oregon Supreme Court's approach in *Salem Academy*, although it was based on federal constitutional principles rather than on those derived from Pennsylvania's state constitution. The Pennsylvania court parted company with the Oregon decision on the question of remedy, but it did so as a matter of state law. Unlike the Oregon court, the Pennsylvania court concluded that all religious schools must be exempt from coverage. Petitioners point to no case, however, holding that the Establishment Clause mandates the exclusion of church employees from FUTA coverage. Thus, the conflict they seek to portray is non-existent.

renders any federal constitutional inquiry unnecessary. *See, e.g.*, *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987)(Sexually explicit material protected under free speech provision of Oregon Constitution; unnecessary to decide question under federal constitution). Were a doctrinal dispute to arise in the context of an unemployment benefits determination, there is a strong likelihood that in Oregon and other jurisdictions it would be analyzed under state law principles first and the challenge might be fully answered by those principles. Whether a federal issue requiring this Court's attention will ultimately arise is, therefore, all the more uncertain.

Even if a state can be said to "establish" religion by taking sides in essentially doctrinal disputes between religious employers and their employees, ample precedent from this Court exists to guide states away from that possible constitutional problem. More than sixty years ago, the Court foreclosed civil authorities from resolving doctrinal disputes among the members of a church or religious organization. In *Gonzalez v. Archbishop*, 280 U.S. 1 (1929), an individual who claimed a right to be a church chaplain resorted to the courts to resolve his dispute with church leaders over his qualifications for the post. Justice Brandeis, writing for the Court, emphasized the very limited role courts and other adjudicatory bodies may play in arbitrating essentially doctrinal disputes:

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive because the parties in interest made them so by contract or otherwise.

280 U.S. at 16.

Forty years later, the Court reaffirmed *Gonzalez* in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969). In *Hull Church*, a doctrinal dispute led to the separation of two local churches from the parent church and litigation over ownership of local church property. The state court submitted the issue to a jury to determine whether the parent church had departed from the tenets of the faith. While acknowledging that neutral, generally applicable principles of property law could be applied to resolve church-related property disputes, the Court left no doubt that the First Amendment prohibits the civil courts from resolving such controversies when they turn on questions of religious doctrine. Noting that the state court's "departure from doctrine" standard would require state courts to determine matters "at the very core of religion — the interpretation of particular church doctrines and the importance of those doctrines to the church[,]" the Court stated: "Plainly the First Amendment forbids civil courts from playing such a role." 393 U.S. at 450.[11]

These precedents suggest not only that government can avoid "entangling inquiries" into church doctrine, but that it may be required to do so.[12] Even if, as petitioners posit, unemployment benefit adjudications will pit employer against employee over

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[11] *Accord Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (same result under common law).

[12] While administrative agencies and courts may be required to inquire sufficiently to assure themselves that a genuine religious question is presented, that inquiry is no more searching or intrusive than the inquiry that must be made to ensure that an employee's religion-based claim is sincerely asserted. *See e.g., Frazee v. Employment Security Dept.*, 489 U.S. 829, 833 (1989) ("States are clearly entitled to assure themselves that there is ample predicate for invoking the Free Exercise Clause."); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981).

matters of religious doctrine, courts and other adjudicators appear bound to defer to the doctrinal interpretations of church officials or other acknowledged spokespersons for a particular religion. At a minimum, given these precedents, the Court should await a showing by these petitioners or others that lower courts cannot draw sufficient guidance from these cases to bring about a correct and uniform resolution of this constitutional challenge at lower court levels.

CONCLUSION

For the above reasons, the Court should deny the petition for writ of certiorari.

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